IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
1. TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVIAGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION TO STAY PROCEEDINGS AND REQUEST FOR EXPEDITED HEARING"

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PLAINTIFF'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION TO STAY PROCEEDINGS AND REQUEST FOR EXPEDITED HEARING"

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits

that Defendants' Motion to Stay Proceedings and Request for Expedited Hearing ("Motion") is not well-taken and should be denied.

I. Introductory Statement

Arkansas has filed a motion for leave to file a bill of complaint with the United States Supreme Court. In that motion, Arkansas contends that, by and through its proposed bill of complaint, the State should be enjoined from (1) prosecuting its claims as to conduct occurring in Arkansas and causing injury and damage in Oklahoma until there has been a full presentation and exhaustion of remedies before the Compact Commission, and (2) applying Oklahoma common law and Oklahoma statutory law to conduct occurring in Arkansas and causing injury and damage in Oklahoma. Using Arkansas' motion before the Supreme Court as a pretext and without regard to the fact that Arkansas has limited its contentions to only certain claims pertaining to conduct occurring in Arkansas and causing injury and damage in Oklahoma, the Poultry Integrator Defendants are now requesting this Court to stay the entirety of the State's case. The Poultry Integrator Defendants' motion should be denied for the following reasons:

1. Inasmuch as Arkansas' proposed bill of complaint before the Supreme Court does not address those aspects of the State's claims arising from conduct occurring within Oklahoma, there is no reason to stay the Oklahoma portion of the State's case.

2. Inasmuch as there is no reason to stay that portion of the State's case arising from conduct occurring within Oklahoma, there is accordingly no reason to toll (a) the time period in which the Poultry Integrator Defendants must serve their third party complaints upon the Oklahoma individuals and entities they have named; and (b) the notice and filing deadlines set forth in Oklahoma's Governmental Tort Claims Act.

3. The thrust of Arkansas' motion and accompanying proposed bill of complaint appears to be a dispute as to whether Oklahoma law can be applied to conduct occurring in Arkansas and causing injury and damages in Oklahoma. Thus, to the extent the State is correctly understanding Arkansas' motion and accompanying proposed bill of complaint, there is likewise no basis to stay the State's prosecution of its claims in this Court against the Poultry Integrator Defendants for the Poultry Integrator Defendants' alleged violations of federal common and statutory law occurring in Arkansas, where those violations have caused injury and damages in Oklahoma.

4. It is highly unlikely that the Supreme Court will grant Arkansas' motion for leave to file a bill of complaint, and even if it were to do so, it is even more unlikely that Arkansas would prevail on the merits of its proposed bill of complaint. Additionally, allowing the State's case to proceed would not cause the Poultry Integrator Defendants to suffer irreparable harm, yet a stay of the State's case would cause substantial harm to the State. Finally, a stay is not in the public interest. Accordingly, the Poultry Integrator Defendants have not met the heavy burden necessary to justify entry of a stay of any portion of the State's case, even those aspects of the state law claims arising from conduct occurring within Arkansas and causing injury and damages within Oklahoma. A stay of the State's case is therefore unwarranted.

II. Legal Standard

Under Tenth Circuit law, a district court must balance four factors in considering a request for stay:

> In assessing the propriety of a stay, a district court should consider: whether the defendants are likely to prevail in the related proceeding; whether, absent a stay, the defendants will suffer irreparable harm; whether the issuance of a stay will cause substantial harm to the other parties to the proceeding; and the public interests at stake.

United Steel Workers of America v. Oregon Steel Mills, Inc., 322 F.3d 1222, 1227 (10th Cir. 2003) (citation omitted). Stays are disfavored. As the Supreme Court has explained:

> [T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Landis v. North American Co., 57 S.Ct. 163, 166 (1936) (citation omitted). The burden of establishing an entitlement to a stay is on the movant and is a heavy one. *See Federal Deposit Insurance Corp. v. First National Bank & Trust Company of Oklahoma City*, 496 F.Supp. 291, 293 (W.D. Okla. 1978) ("[T]he burden is on the party seeking the stay to show that there is a pressing need for delay and that the other party will not suffer harm from entry of the stay order. The stay of a case is a discretion that will be used sparingly and only upon a clear showing by the moving party of hardship or inequity so great as to overbalance all possible inconvenience of the delay to his opponent").

III. Argument

A. There is no basis to stay the Oklahoma portion of the State's case or any of the State's federal law claims.

The Poultry Integrator Defendants seek to stay the entirety of the State's case. Even were a stay warranted -- and the State will demonstrate below that it certainly is not -- there is no basis for staying the entirety of the State's case. Nothing, repeat nothing, in Arkansas' motion for leave to file a bill of complaint or in the proposed bill of complaint itself takes issue with the State's ability to press its claims in this Court against the Poultry Integrator Defendants for the Poultry Integrator Defendants' conduct occurring within Oklahoma. Accordingly, there is no basis for staying any aspect of the State's case based on conduct occurring within Oklahoma. Likewise, a fair reading of Arkansas' motion and proposed bill of complaint reflects that Arkansas is

apparently not challenging the ability of the State to proceed with its federal law claims pertaining to conduct occurring in Arkansas and causing injury and damages in Oklahoma. The State should thus be permitted to proceed with its federal statutory and common law claims, as well as its state law claims against the Poultry Integrator Defendants for the Poultry Integrator Defendants' conduct occurring within Oklahoma.

For similar reasons there is no basis for staying the time for the Poultry Integrator Defendants to serve the third-party complaints they have filed in this case. Those third-party complaints name only Oklahoma entities and therefore are not in any way implicated in Arkansas' motion pending before the Supreme Court. Indeed, the State believes the basis for these third-party complaints to be without foundation and intends to move to strike them as soon as service is accomplished. To delay service would be to delay the resolution of the third-party complaint issue.

Finally, again for similar reasons, there is no basis for tolling the running of the statute of limitations under the Oklahoma Governmental Tort Claims Act. Any claim asserted by the Poultry Integrator Defendants against any entity covered by the Oklahoma Governmental Tort Claims Act would, by necessity, be related to alleged conduct occurring within Oklahoma -- conduct not covered by Arkansas' motion pending before the Supreme Court.

B. The Poultry Integrator Defendants have failed to carry their burden under *Oregon Steel Mills* and, therefore, are not entitled to a stay.

In order to carry their burden for a stay, the Poultry Integrator Defendants must clearly establish (1) that Arkansas is likely to prevail in the related proceeding, (2) that absent a stay the Poultry Integrator Defendants will suffer irreparable harm, (3) that the issuance of a stay will not cause substantial harm to the State, and (4) that the public interests at stake favor issuance of a

stay. *See Oregon Steel Mills, Inc.*, 322 F.3d at 1227. The Poultry Integrator Defendants can establish none of these prerequisites.

1. Arkansas is not likely to prevail in the proceedings before the Supreme Court.

The Poultry Integrator Defendants face a double burden in seeking to show that they will prevail before the Supreme Court. They must show both that the Court will allow them to file the bill of complaint and that they will prevail should such leave be granted. This they cannot do.

It is very unlikely that the Supreme Court will grant Arkansas' motion for leave to file a bill of complaint. Indeed, the Supreme Court exercises its original jurisdiction only "sparingly." As stated in *Mississippi v. Louisiana*, 506 U.S. 73, 76-77, 113 S.Ct. 549, 552-53 (1992):

> We have said more than once that our original jurisdiction should be exercised only "sparingly." *See Wyoming v. Oklahoma*, 502 U.S. 437, 450, 112 S.Ct. 789, 798, 117 L.Ed.2d 1 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 739, 101 S.Ct. 2114, 2125, 68 L.Ed.2d 576 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796, 96 S.Ct. 1845, 1846, 48 L.Ed.2d 376 (1976). Indeed, Chief Justice Fuller wrote nearly a century ago that our original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana v. Texas*, 176 U.S. 1, 15, 20 S.Ct. 251, 256, 44 L.Ed. 347 (1900). Recognizing the "delicate and grave" character of our original jurisdiction, we have interpreted the Constitution and 28 U.S.C. § 1251(a) as making our original jurisdiction "obligatory only in appropriate cases," *Illinois v. City of Milwaukee*, 406 U.S. 91, 93, 92 S.Ct. 1385, 1388, 31 L.Ed.2d 712 (1972), and as providing us "with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas v. New Mexico*, 462 U.S. 554, 570, 103 S.Ct. 2558, 2568, 77 L.Ed.2d 1 (1983).
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> We first exercised this discretion not to accept original actions in cases within our nonexclusive original jurisdiction, such as actions by States against citizens of other States, *see Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 91 S.Ct. 1005, 28 L.Ed.2d 256 (1971), and actions between the United States and a State, *see United States v. Nevada*, 412 U.S. 534, 93 S.Ct. 2763, 37 L.Ed.2d 132 (1973). But we have since carried over its exercise to actions between two States, where our jurisdiction is exclusive. *See Arizona v. New Mexico, supra; California v. West Virginia*, 454 U.S. 1027, 102 S.Ct. 561, 70 L.Ed.2d 470 (1981); *Texas v. New Mexico, supra*. Determining whether a case is "appropriate"

> for our original jurisdiction involves an examination of two factors. First, we look to "the nature of the interest of the complaining State," *Massachusetts v. Missouri*, 308 U.S. 1, 18, 60 S.Ct. 39, 43, 84 L.Ed. 3 (1939), focusing on the "seriousness and dignity of the claim," *City of Milwaukee, supra*, 406 U.S., at 93, 92 S.Ct., at 1388. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to casus belli if the States were fully sovereign." *Texas v. New Mexico, supra*, 462 U.S., at 571, n. 18, 103 S.Ct., at 2569, n. 18. Second, we explore the availability of an alternative forum in which the issue tendered can be resolved. *City of Milwaukee, supra*, 406 U.S., at 93, 92 S.Ct., at 1388. In *Arizona v. New Mexico*, for example, we declined to exercise original jurisdiction of an action by Arizona against New Mexico challenging a New Mexico electricity tax because of a pending state-court action by three Arizona utilities challenging the same tax: "[W]e are persuaded that the pending state-court action provides an appropriate forum in which the issues tendered here may be litigated." 425 U.S., at 797, 96 S.Ct., at 1847 (emphasis in original).

With its motion before the Supreme Court, it is readily apparent that the State of Arkansas is not asserting any real interest of its own. Rather, it is asserting the interests of a select few large corporations merely doing business in Arkansas -- some of which are not even Arkansas citizens. As the Supreme Court indicated in *Mississippi*, this is hardly the type of claim it would exercise its limited original jurisdiction over.[1] At this point in time, moreover,

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[1] In fact, commentators in the press have so opined:

> Lee A. Albert, a law professor at the University of Buffalo, said he's confident Beebe won't bring the high court into the two-state dispute over water quality with Oklahoma Attorney General Drew Edmondson.
>
> "The Supreme Court won't deem it to be a bona fide suit between Oklahoma and Arkansas," said Albert, who worked as a Supreme Court clerk for Chief Justice Byron White from 1963-65. "If this were allowed, that would lead to an increase in the number of cases the Supreme Court has, and the Supreme Court is not likely to do that.
>
> "There are lots of times where states sue private people in another state, and the Supreme Court can't have them all."
>
> Other attorneys, including Stephen M. Shapiro of Chicago, shared Albert's view. Shapiro, who's argued 24 cases before the Supreme Court, said it's unlikely Beebe

this Court provides an adequate alternative forum for the examination and resolution of the concerns raised by Arkansas. In a similar situation the United States Supreme Court has recognized that an original action between two states is unnecessary where the same issues in the original action are already being litigated between a state and private parties:

> In the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the Issues tendered here may be litigated. If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. 1257(2).

Arizona v. New Mexico, 425 U.S. 794, 797 (1976). On this basis alone, therefore, this Court should deny the stay.

Furthermore, even if the Supreme Court were to grant Arkansas' motion for leave to file a bill of complaint, it is very unlikely that Arkansas would prevail on the merits. Obviously sensing the weakness of their position, the Poultry Integrator Defendants hardly address this point in their motion. With no supporting analysis, the Poultry Integrator Defendants merely state: "Because this case represents a blatant attempt by Oklahoma to impose its legal standards beyond the borders of the State, in violation of both the Constitution and the Compact, the likelihood of Arkansas prevailing in the Supreme Court Action is great." Motion, p. 6. As the State will thoroughly explain in its responsive papers before the Supreme Court, and as the State

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> will persuade the high court to listen to his case or agree to appoint a special master to investigate.
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> "The Supreme Court is not generous in allowing original cases to be filed," said Shapiro, a co-author of Supreme Court Practice. "If it thinks there's another forum, sometimes they deny."

Robert J. Smith, "Experts: Beebe's suit won't fly," Arkansas Democrat Gazette, Nov. 5, 2005 (http://www.nwanews.com/story.php?paper=adg&storyid=135390).

has explained to this Court in its responses to the Poultry Integrator Defendants' 12(b) motions, statements of this sort do not accurately reflect the State's lawsuit against the Poultry Integrator Defendants or the law applicable to that lawsuit.

Arkansas repeatedly misrepresents the State's suit against the Poultry Integrator Defendants when it claims that the State improperly seeks to impose its law or policy choices on economic activity within Arkansas.[2] In fact, the matter is much more routine. Actions by the Poultry Integrator Defendants occurring in Arkansas are causing injury and damages in Oklahoma. What common law ultimately applies to this conduct occurring in Arkansas and causing injury and damages in Oklahoma is a classic choice of law decision for this Court to make. The State has contended that under a choice of law analysis, Oklahoma law may be properly and constitutionally applied to such facts. *See, e.g.,* "Plaintiff's Response in Opposition to 'Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint,'" pp. 19-22. Accordingly, should this Court agree with the State's contention that Oklahoma common law does apply to these facts under a choice of law analysis, Arkansas' sovereignty contentions with regards to these to claims stand no chance of success before the Supreme Court. *See Brand v. Menlove Dodge*, 796 F.2d 1070, 1076, fn. 5 (9th Cir. 1986) ("The conflict with the sovereignty of the defendant's state is not a very significant factor in cases involving only U.S. citizens;

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[2] Suffice it to say, as pertains to the present analysis, the State is only seeking to address the Poultry Integrator Defendants' conduct in Arkansas that is causing injury and damage in Oklahoma. Arkansas joins the Poultry Integrator Defendants (and vice versa) in repeating the mantra that the challenged waste disposal practices are lawful, and, by implication, beyond challenge. Arkansas and the Poultry Integrator Defendants evidently hope to repeat this mantra so frequently that it becomes unassailable truth, thus avoiding all evidence to the contrary. However, the Poultry Integrator Defendants' assertions of innocence are merely the beginning of this contested case, not the end of it. The State has alleged, and is entitled to prove, that the Poultry Integrator Defendants' waste disposal practices result in the application of phosphorus, and other constituents, at rates far in excess of that needed for fertilizer and under circumstances which violate not only federal law (CERCLA, SWDA and the federal common law of nuisance) which unquestionably applies in Arkansas, but also violate applicable state law.

conflicting policies between states are settled through choice of law analysis, not through loss of jurisdiction").[3] Further, it is no encroachment on the sovereignty of Arkansas for the State to hold the Poultry Integrator Defendants responsible under Oklahoma law, based upon Oklahoma's profound interest in protecting its own citizens and its own environment. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571-73, 116 S.Ct. 1589, 1597-8 (1996).

Likewise, Arkansas' contention that application of Oklahoma law to the conduct of the Poultry Integrator Defendants in Arkansas and causing injury and damage in Oklahoma would run afoul of the dormant Commerce Clause is highly unlikely to succeed. First, it is doubtful that the Commerce Clause even applies to lawsuits brought pursuant to state common law, *see, e.g., Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F.Supp.2d 245, 254 (D.N.J. 2000); *NAACP v. Acusport, Inc.* 271 F.Supp.2d 435, 464 (E.D.N.Y. 2003); *City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp.2d 256, 285 (E.D.N.Y. 2004); *Crowley v. Cybersource Corp.*, 166 F.Supp.2d 1263, 1272 (N.D. Cal. 2001), but even if it did, the contention that application of Oklahoma law violates the Commerce Clause fails under the *Pike v. Bruce Church Inc.*, 90 S.Ct. 844 (1970) test. There can be no dispute that Oklahoma law applies even-handedly to both Oklahoma and Arkansas polluters and would effectuate a legitimate local public interest. Moreover, Arkansas has neither come forward with any

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[3] In any event, the choice of law issue has yet to be resolved by this Court, thereby rendering Arkansas' motion before the Supreme Court premature. It is also possible that this Court might determine that the federal common law of nuisance applies to the Arkansas conduct in this case or, although Oklahoma believes it highly unlikely and a legally incorrect outcome, that Arkansas common law applies to the Arkansas conduct in this case. In such case, Arkansas' sovereignty contentions regarding the application of common law would disappear entirely. Simply put, Arkansas' motion (and hence the Poultry Integrator Defendants' motion) is premature. *See California v. Texas*, 437 U.S. 601, 98 S.Ct. 3107 (1978) (per curium denial of motion for leave to file bill of complaint) (Justice Stewart concurring) ("The original jurisdiction of this Court exists to remedy real and substantial injuries inflicted by sovereign States upon their sister States. As yet, California has suffered no injury at the hand of Texas . . .").

evidence, nor even alleged, that any burden that might be imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

With respect to the Compact, it is again highly unlikely that Arkansas will prevail on the merits. As made clear in "Plaintiff's Response in Opposition to 'Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action,'" pp. 13-17, the State need not exhaust its remedies before the Compact Commission. As plainly stated in the Compact, there is no requirement that the State proceed before the Compact Commission, let alone exhaust its remedies before the Compact Commission, before proceeding to court:

> The making of findings, recommendations, or reports by the Commission shall not be a condition precedent to instituting or maintaining any action or proceeding of any kind by a signatory state in any court, or before any tribunal, agency or officer, for the protection of any right under this Compact or for the enforcement of any of its provisions . . . .

82 Okla. Stat. § 1421 (Art. IX(A)(8)). In fact, the Compact specifically endorses the use of state and federal pollution control laws by the State:

> The States of Arkansas and Oklahoma mutually agree to:
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> * * *
>
> E. Utilize the provisions of all federal and state water pollution laws and to recognize such water quality standards as may be now or hereafter established under the Federal Water Pollution Control Act in the resolution of any pollution problems affecting the waters of the Arkansas River Basin.

82 Okla. Stat. § 1421 (Art. VII(E)).

In sum, the Poultry Integrator Defendants have failed to carry their burden in demonstrating that Arkansas has a likelihood of the Supreme Court even granting its motion for leave to file a bill of complaint, let alone a likelihood of succeeding on the merits of that complaint were it to be allowed.

2. The Poultry Integrator Defendants will not suffer "irreparable harm" if the stay is not granted.

The Poultry Integrator Defendants fail to demonstrate irreparable harm. This is not the sort of clear case of hardship or inequity necessary to justify a stay. *See Landis v. North American Co.*, 57 S.Ct. 163, 166 (1936).

In connection with their contention that they will suffer irreparable harm if the stay is not granted, the Poultry Integrator Defendants advance two arguments. The first argument is -- quite amazingly -- that they will suffer irreparable harm if they lose this action and "this Court . . . grants Oklahoma's requested relief." Motion, p. 7. The second argument is that they will suffer irreparable harm if they are forced to incur the costs of litigating this action while Arkansas' motion is pending before the Supreme Court. Motion, pp. 7-8. Neither of these arguments has any merit. The Poultry Integrator Defendants have thus failed to carry their heavy burden in demonstrating irreparable harm.

This first argument of the Poultry Integrator Defendants, namely that they will suffer irreparable harm if they lose this lawsuit and are enjoined from and required to abate their pollution-causing conduct in the IRW, shows a profound lack of confidence both in their defenses and in this Court and its judgment. A final injunction would only be entered after a trial on the merits, after the Poultry Integrator Defendants have been afforded due process and the opportunity to present their defense, and after the Court finds, as it should, an injunction is appropriate. Such a judgment on the merits would thus be a well-considered judicial act and not, by any stretch, irreparable harm. *See, e.g., United States v. Cervantes-Valenzuela*, 931 F.2d 27, 29 (9th Cir. 1991) ("We assume that the district court knows and applies the law correctly").

As to the second argument of the Poultry Integrator Defendants, it is well established that being forced to incur the costs of litigation does not constitute irreparable harm. As explained by the Supreme Court:

> [W]e do not doubt that the burden of defending this proceeding will be substantial. But the expense and annoyance of litigation is part of the social burden of living under government. As we recently reiterated: Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.

Federal Trade Commission v. Standard Oil Company of California, 449 U.S. 232, 244, 101 S.Ct. 488, 495 (1980) (internal quotations and citations omitted); *see also Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough [to constitute irreparable injury]. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."). Furthermore, it should not be forgotten that the Poultry Integrator Defendants will have to defend themselves against the State's claims for pollution occurring within Oklahoma, and apparently against the State's federal claims as well, in any event, since those claims are unchallenged by Arkansas before the Supreme Court.[4]

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[4] The Poultry Integrator Defendants also briefly express concern that they will suffer irreparable harm because there will be simultaneous litigation of facts and law if this action is not stayed. Motion, pp. 7-8. Such an outcome would not constitute irreparable harm, in part because the Poultry Integrator Defendants are not parties before the Supreme Court and bear no expense of litigating there. Moreover, as discussed above, the present case involves numerous legal claims and issues that have not been placed in issue by Arkansas before the Supreme Court. "Arkansas does not request an adjudication of the merits of Oklahoma's claims . . . ." *See* Arkansas Motion for Leave to File Bill of Complaint, pp. 10 and 30.

3. A stay would cause the State to suffer substantial harm

The State has brought this action against the Poultry Defendant Integrators because the millions of chickens and turkeys owned by the Poultry Integrator Defendants leave hundreds of thousands of tons of waste in the IRW every year under circumstances in which constituents of their waste inevitably pollute the waters of Oklahoma. The Poultry Integrator Defendants' waste disposal practices, which leave waste on the ground exposed to the elements and inevitably lead to the buildup of pollutants in the soil and run off and leaching of pollutants, cause widespread pollution of Oklahoma's natural resources.[5] These improper poultry waste disposal practices harm the environment and speed the deterioration of natural resources, including but not limited to streams, rivers and Lake Tenkiller.

Currently, the Illinois River, Baron Fork Creek and Flint Creek are all impaired by bacterial contamination and are not meeting the standards for primary body contact recreation. *Oklahoma Senate Bill 972 Report 2005 Update.* www.ose.state.ok.us/documents/CWA/SB972 report_2005update.pdf. These streams have also been found not to support their uses for aesthetics and as public or private water supplies. *Id.* While the States of Oklahoma and Arkansas have greatly reduced the amount of phosphorus coming from point sources in the IRW, "all the water quality improvements realized at base flow conditions are promptly erased when rainfall in the watersheds causes runoff of phosphorus exposed to the elements. The most significant source of this phosphorus is surface applied poultry litter." *Id. at 3.* Phosphorus is not the only constituent of concern; metals, bacteria, antibiotics, and nitrogen also enter into the

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[5] Arkansas recognizes that improper utilization of poultry litter may result in a buildup of nutrients in the soil and result in the nutrients leaving the soil and entering the waters within the state. Ark. Stat. § 15-20-902(3). However, even basic nutrient management plans for poultry litter application are not required by Arkansas until January 1, 2007. Ark. Stat. § 15-20-1106(f).

IRW. *See* First Amended Complaint, ¶¶ 48-64. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. *See Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545, 107 S.Ct. 1396, 1404 (1987). The sooner these waste disposal practices are abated, the sooner the State can effectively remedy the damage. A stay of this right would irreparably harm the State in its lawful ability to protect its people and its environment.

The Poultry Integrator Defendants' concern for conserving the State's "limited public resources" is disingenuous. Motion, p. 8. The State has secured adequate resources to prosecute this case and defend the case brought by Arkansas if the Supreme Court decides to assume jurisdiction. The State brought this suit to save one of its most precious and limited public resources: its water. Further, the Poultry Integrator Defendants' reference to the slow pace with which the State has proceeded heretofore shows their disdain for Oklahoma's environment and its good faith during settlement negotiations which the State engaged in for nearly three years. The State has not proceeded slowly; it worked diligently to address the problem voluntarily and through settlement negotiations to prevent litigation. No stay is needed to help the State's litigation effort.

4. A Stay is not in the public interest.

The Poultry Integrator Defendants' arguments regarding the public interest rehash Arkansas' Supreme Court arguments and continue to mischaracterize the State's lawsuit with the assertion that a stay is necessary "to prevent Arkansas citizens from being required to respond to Oklahoma's constitutionally impermissible claims." Motion, pp. 8-9. A simple reading of the Amended Complaint shows that the State has sued only the Poultry Integrator Defendants, none of whom have challenged the Court's personal jurisdiction over them in light of their extensive

operations in the Oklahoma portion of the IRW. The State has taken no action that will require a response by any Arkansas citizens other than by some of the Poultry Integrator Defendants.

The public interest truly lies squarely in favor of protecting the public and the environment from the improper waste disposal practices of the Poultry Integrator Defendants. The Congress of the United States has passed legislation making unlawful the Poultry Integrator Defendants' practices, as has the Oklahoma Legislature. The longstanding tradition of the common law gives remedies for the Poultry Integrator Defendants' waste disposal practices and to protect the waters of Oklahoma. It is public policy of the State to protect these waters from pollution. 82 Okla. Stat. § 1084.1 provides:

> Whereas the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, it is hereby declared to be the public policy of this state to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses . . . .

Complementing this interest in the waters, the State "has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 102 S.Ct. 3260, 3269 (1982); *see also Georgia v. Tennessee Copper Co.*, 27 S.Ct. 618, 619 (1907) ("[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"). "[I]t is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights.'" *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citation omitted); *see also Spiva v. State of Oklahoma*, 584 P.2d 1355, 1360 (Okla. Crim. App. 1978) ("That the State has a valid interest in matters which affect the public health, safety and general welfare is undisputed . . .").

IV. Conclusion

For the reasons stated above, the Poultry Integrator Defendants' motion should be denied in all respects.

Respectfully submitted,

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December 2, 2005

CERTIFICATE OF SERVICE

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